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RONALD W. ROSENBERGER, et al.,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, et al.,
Respondents.

On Writ of Certiorari to the
Fourth Circuit Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

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No. 94-329

In the
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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

IDENTITY AND INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of affirmance. All parties have consented to the filing of amicus curiae briefs in letters lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the mandatory fees arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases before this Court including *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). PLF attorneys also represented the students in *Smith v. Regents of University of California*, 4 Cal. 4th 843, *cert. denied*, ___ U.S. ___, 126 L. Ed. 2d 140 (1993).

PLF believes that students must not be coerced into subsidizing views with which they disagree. Such coercion can take the form of the mandatory payment of "activity fees" which are then distributed to various student groups and activities regardless of educational content. PLF emphasizes that *all* groups, regardless of the content of their speech, should have access to campus facilities on an equal basis. On the other hand, no group whose purpose is to espouse a political or ideological (including religious) viewpoint should be entitled to receive financial support from individuals who do not share the views of the group. Universities must not violate the First Amendment speech and association rights of those students who choose not to

subsidize noneducational or only incidentally educational activities.

For the reasons stated herein, the decision of the Fourth Circuit Court of Appeals should be affirmed.

STATEMENT OF THE CASE

The University of Virginia (University) collects from each student a "student activity fee" of $14 per semester. *Rosenberger v. Rector and Visitors of the University of Virginia*, 18 F.3d 269, 270 (4th Cir. 1994). These fees are collected into the Student Activities Fund, which supports a wide variety of student organizations, activities, and publications at the University. *Id.* The Guidelines established to determine who should receive money from this fund exclude the following expenditures and activities: (1) honoraria or similar fees; (2) religious activities; (3) social entertainment and related expenses; (4) philanthropic contributions and activities; and (5) political activities. *Id.* at 271. Thus, the Guidelines are supposed to ensure that the funds are administered "in a manner consistent with the *educational* purpose of the University as well as with State and Federal law." *Id.* (emphasis added).

Wide Awake Productions (WAP) is a group of undergraduates attending the University of Virginia who produce a Christian-oriented publication called *Wide Awake*. *Id.* at 271-72. There is no dispute that the purpose of this magazine is to promote Christian belief among the students at the University. *Id.* at 272-73. Five thousand copies of each issue are distributed free of charge around campus. *Id.* at 272. WAP is recognized as a Contracted Independent Organization (CIO), which grants it access to all campus

facilities, computers, and the right to apply for Student Activities Fund money. *Id.* at 270, 273. WAP requested reimbursement from the Student Activities Fund the cost of publishing the magazine ($5,862). *Id.* at 273. The request was denied by the University because publication of the magazine constituted a "religious activity" as defined by the Guidelines. *Id.* The Guidelines' definition of a "religious activity" is "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." *Id.* at 271 n.2. WAP exhausted all its internal appeals. *Id.* at 274. In each denial of the requested funding, the University emphasized that WAP could still print (using campus facilities and equipment) and distribute copies of the magazine on campus. *Id.* at 273-74. The members of WAP then sued the University.

The District Court ruled for the University on the grounds that the Student Activity Fund (SAF) was a nonpublic forum and that the Guidelines were reasonable and did not result in viewpoint discrimination. *Rosenberger v. Rector and Visitors of the University of Virginia*, 795 F. Supp. 175, 180-81 (W.D. Va. 1992). On appeal, the Fourth Circuit affirmed the result of the District Court, but using a different analysis based primarily on the law of prior restraint and the First Amendment Establishment Clause. *Rosenberger*, 18 F.3d at 282-87.

SUMMARY OF ARGUMENT

Universities collecting mandatory student fees from their students must defend the First Amendment rights of freedom of speech and association of those students who do not wish to fund the political and ideological (including religious) agendas of certain student organizations. Thus,

universities have two options. First, universities may implement procedures to rebate the portion of the fees used for noneducational (or only incidentally educational) activities. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986); *Keller v. State Bar of California*, 496 U.S. at 17; *Smith v. Regents of University of California*, 4 Cal. 4th at 862-63. Second, the universities may simply choose to use mandatory student fees to fund only educational activities (or those which do not implicate any political or ideological ideas or activities, *e.g.*, dances) at all. A public university may not use the student fees of dissenters to finance student groups when the educational benefits offered by the groups become incidental to the groups' primary function of advancing their own political and ideological interests. *Smith*, 4 Cal. 4th at 859-60.

By choosing to restrict the use of mandatory fees for only demonstrably educational activities--excluding social, political, philanthropic, and religious activities from funding eligibility--the University of Virginia has layed the foundation for protection of the First Amendment rights of those students who would choose to subsidize only the University's core mission.[1] It has also tried to save itself the annual expense and controversy of attempting to determine which portion of the mandatory student fees must be rebated to dissenting students. Although the Fourth Circuit Court of Appeals did not decide the case on this basis, Pacific Legal Foundation urges this Court to consider

[1] The record in this case is not sufficient to determine whether this policy in fact protects student's First Amendment rights to be free from compelled subsidization of others speech.

the implications of its decision on the First Amendment rights of mandatory student fee payers when reaching its decision.

ARGUMENT

THE CONSTITUTION REQUIRES UNIVERSITIES TO RESTRICT THE USE OF MANDATORY STUDENT FEES TO PROTECT THE FIRST AMENDMENT RIGHTS OF THEIR DISSENTING STUDENTS

Ronald W. Rosenberger and Wide Awake Productions claim a right to have other students subsidize their publication, regardless of whether the other students wish to support the views expressed in the magazine. The Fourth Circuit Court of Appeals did not view this case in this context, choosing instead to analyze the refusal of the University of Virginia to reimburse the costs of producing the publication as a prior restraint. *Rosenberger*, 18 F.3d at 279. Despite the Fourth Circuit's chosen analysis (which led to the correct result), the court below did not adequately examine the implications of the funding source's genesis in mandatory student fees.

The court below notes that the SAF is comprised of mandatory student fees. *Id.* at 270. However, the rights of the students who must supply the money for that fund are never again mentioned. This Court, while affirming the decision below, should ensure that the rights of dissenting students to refrain from funding noneducational or incidentally educational activities with which they disagree remains intact and is not marginalized.

The Fourth Circuit eloquently expressed the difference between being permitted to speak freely, and forcing others to subsidize one's speech:

> While the First Amendment thus represents a guarantee that freedom will be preserved in the face of legislative ambition, it goes no further. Although the Amendment preserves inviolate the individual's *right* to speak, it sustains speech itself only indirectly. The Speech and Press Clause cannot be metamorphosed into a promise that the federal government will purchase a bullhorn, paper, and ink for the convenience of every garrulous member of the American populace.

Rosenberger, 18 F.3d at 277 (emphasis in original). This fundamental principle balances Americans' right to speak with the right of other Americans to be free from coercion to support such speech. This Court, whatever its decision regarding the Establishment Clause issue (on which Pacific Legal Foundation takes no position), must assure that its opinion will not lead to coercive funding of speech with which individuals disagree.

A. Agency Shop Fee and Integrated Bar Cases Demonstrate the Constitutional Requirement That the Government Refrain from Coercing Subsidization of Views with Which One Disagrees

Although this Court has never ruled specifically on the issues of activities funded by mandatory student fees, cases in the agency shop fee and integrated bar context provide a framework for analyzing the appropriate use of mandatory student fees. The constitutional principles ensconced in the First Amendment and, central to this case,

are the freedoms of speech and association. In this case, the principles are inverted: the rights to refrain from speaking or associating.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977), this Court held that "the fact that [individuals] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." The nature of these rights are not restricted only to those activities which might be labeled "political."

> [O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters--to take a nonexhaustive list of labels--is not entitled to full First Amendment protection. ... Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs the critical constitutional inquiry.

Id. at 231-32 (citations omitted). *Abood* involved nonunion public school teachers who were compelled to pay an agency shop fee to the teachers' union. The court upheld the requirement for all teachers in a bargaining unit to support the collective bargaining representative, but ruled that the Constitution was violated if nonmembers were compelled to pay for political or ideological activities that were unrelated to collective bargaining, contract administration, and grievance adjustment. *Id.* at 235-36.

These same principles were held to apply to attorneys who are forced, by state law, to belong to and pay dues to

a bar association in *Keller v. State Bar of California*, 496 U.S. 1. In *Keller*, this Court dismissed arguments that the Bar was not bound by prior case law concerning compelled union dues. The Bar had argued that the union fee cases should be distinguished from compelled bar dues on the grounds that the Bar assertedly served a more substantial public interest than the union's private economic interest. *Id.* at 13. This Court replied that

> legislative recognition that the agency-shop arrangements serve vital national interests in preserving industrial peace, indicates that such arrangements serve substantial public interests as well. We are not possessed of any scales which would enable us to determine that the one outweighs the other sufficiently to produce a different result here.

Id. (citations omitted). This Court then announced the guiding standard for determining challenges to the Bar's expenditures: "[W]hether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14.

Keller was followed by *Lehnert v. Ferris Faculty Association*, 500 U.S. 507. In that case, a plurality of this Court formulated a three-part test to be used in compulsory fee challenges. This Court ruled that an expenditure is chargeable to dissenters if (1) it is germane to the activity for which compelled fees are permissible; (2) it is justified by the government's vital policy interest that justified the compelled fees; and (3) it does not significantly add to the burdening of free speech already occasioned by the compelled fee. *Id.* at 518.

All of these cases were extremely important vindications of the rights of Americans to refrain from speaking or associating with speakers who advocate ideas with which they disagree. The facts of the *Lehnert* case in particular demonstrate why these principles must be applied with equal vigor in the mandatory student fee context. The plaintiffs in *Lehnert* were state college professors who paid agency shop fees to the faculty union. Upon their challenge to the union's practice of using compelled fees for all union activities, including lobbying, this Court held that the professors could not be compelled to subsidize any activities outside the limited scope of contract ratification or implementation, even matters as closely related to the union's interests as taxes for the support of public education. *Lehnert*, 500 U.S. at 520, 526. The symmetry of public university professors and the students they instruct in relation to the same First Amendment rights requires the same vigilance in protecting those rights for both groups. Although this Court had never specifically addressed the issue of mandatory student fees, lower courts have relied on the cases described above in analyzing such student fee cases. *See, e.g., Smith v. Regents of University of California*, 4 Cal. 4th at 852-65; *Carroll v. Blinken*, 957 F.2d 991, 996-97 (2d Cir.), *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 224 (1992); *Galda v. Rutgers*, 772 F.2d 1060, 1063-64 (3d Cir. 1985).

B. Mandatory Student Fees Must Be Used Either Exclusively for Educational Activities or the University Must Rebate the Amount of the Fee Used for Noneducational Activities to Dissenters

The California Supreme Court decision in *Smith v. Regents of University of California*, 4 Cal. 4th 843, dramatically points out the difficulties a university encounters when it does not forbid the use of mandatory fees for

noneducational purposes. In that case, the state Supreme Court ruled that the University of California could not constitutionally fund *all* activities, no matter how political, with mandatory student funds. *Smith*, 4 Cal. 4th at 853.

Smith involved the use of mandatory student activity fees to fund, among other things, campus organizations that engaged in political or ideological activities. The California Supreme Court held that dissenting students could *not* be coerced to pay fees for such programs espousing views the students opposed: "[T]he constitutional guaranties of free speech and association do not permit the state to make speech a matter of compulsion and coercion." *Smith*, 4 Cal. 4th at 848. In reaching its decision, the court recognized the two conflicting principles vying for supremacy in the case. First, the government may not compel a person to contribute money to support political or ideological causes. *Keller*, 496 U.S. at 9-10; *Abood*, 431 U.S. at 234-35; *Smith*, 4 Cal. 4th at 852. Second, the University requires considerable discretion to determine how best to carry out its educational mission. *Smith*, 4 Cal. 4th at 852.

Several pronouncements of the California high court bear strongly on this case. First, the court reaffirmed the principle that in First Amendment compulsory fee cases, courts must apply strict scrutiny to the programs which implicate the dissenters' rights.

> Because the use of a mandatory fee implicates freedom of association, strict scrutiny applies. ... [E]ven when the government has a sufficiently compelling interest to require a person to subsidize an organization against his or her will, the resulting burden on freedom of association

> "requires that the procedure be carefully tailored to minimize the infringement."

Id. at 853 (citations omitted).

> Thus, under *Lehnert*, even if the state has a sufficiently compelling interest to require unwilling persons to support an organization financially, the state may not compel support for lobbying efforts except on those matters that are strictly necessary to further the interest that justified the requirement of support.

Id. at 866.

The principles described above demonstrate the constitutional mandate which requires the University of Virginia to use mandatory fees to fund only those activities which further the school's educational mission. By funding only "educational" activities, the University insulates itself from lawsuits by dissenting students who disagree with the messages propounded by various noneducational or incidentally educational groups on campus. As the funding decisions would be subjected to strict scrutiny, the University runs a very high risk of incurring liability to dissenting students. *See* La Fetra, *Recent Developments in Mandatory Student Fee Cases: Carroll v. Blinken and Smith v. Regents of University of California*, 10 J. of L. and POL. 579 (1994).

The California Supreme Court recognized the great impact of *Keller* on mandatory dues cases, be they in the context of students, unions, or integrated bars. The *Smith* court interpreted this Court's cases as

> [making] clear that the use of mandatory contributions must be "germane," not simply to any purpose the organization chooses to declare for itself, but "to the purpose for which compelled association was justified" as a matter of constitutional law. [Citing *Keller*.] In other words, the existence of a compelling interest sometimes permits the state to require a person to associate with an organization, or to support it financially, despite the general constitutional prohibition against laws with that effect. However, that one's support may be compelled for some purposes does not mean that one must also subsidize every activity the organization in question chooses to undertake.

Id. at 854 (citations omitted).

Given, then, that the University of California could not extract money from its students to fund political and ideological activities with which they disagree, the question became what should the University do to avoid the constitutional infirmities? The California Supreme Court found that if the University was to continue funding political and ideological activities from the student activity fund, the University must implement the procedures announced by the Court in *Chicago Teachers Union v. Hudson*, 475 U.S. at 301-10, and adopted in *Keller v. State Bar of California*, 496 U.S. at 16-17. These procedures require "'an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.'" *Keller*, 596 U.S. at 16; *Smith*, 4 Cal. 4th at 862-63. These procedures culminate in the reimbursement to dissenters of

the amount of the fee used in violation of the dissenters' constitutional rights. However, if the University refuses in the first place to subsidize political and ideological activities through mandatory fees, it does not have to provide a refund, thus obviating the need for the procedures just described. *Id.*

As applied in this case the University of Virginia's policies avoid the constitutional misuse of mandatory student funds by restricting the eligibility of activities to receive the funds to those which had only educational purposes. When mandatory fees are restricted to support those student groups whose educational purpose has not become merely incidental to the groups' primary function of advancing their own political and ideological interests, the First Amendment rights of dissenting students are protected. *Smith*, 4 Cal. 4th at 859. Wide Awake Productions cannot force the University to violate the rights of dissenting students who must contribute to the Student Activity Fund.

CONCLUSION

As this Court has held, "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" *Keller*, 496 U.S. at 10. These words of Thomas Jefferson should be implemented by Jefferson's own university, the University of Virginia. This Court should assure that dissenting students at the University will continue to be protected from coerced

subsidization of speech with which they disagree. For the foregoing reasons, the decision of the Fourth Circuit Court of Appeals should be affirmed.

DATED: January, 1995.

Respectfully submitted,

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